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No. 91-951

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

OWEN D. OKSANEN, M.D.,

Petitioner,

v.

PAGE MEMORIAL HOSPITAL; J.R. HOLSINGER, M.D.; FANG S. HORNG, M.D.; JAMES G. DALE, D.O.; ROMULO ANCHETA, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

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QUESTIONS PRESENTED

1. Are a hospital and the members of its medical staff to whom decisions affecting staff privileges are delegated in the first instance capable as a matter of law of contracting, combining or conspiring in restraint of trade in violation of the Sherman Act, 15 U.S.C. § 1, during the peer review process?

2. Was summary judgment properly granted prior to the conclusion of discovery where the evidence, including plaintiff's evidence, demonstrated a legitimate basis for corrective action, independent action by the members of the medical staff, and a lack of any adverse impact on competition?

Rule 29.1 List

Respondent Page Memorial Hospital, a non-profit corporation, has no parent or subsidiary companies to list pursuant to Rule 29.1.

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The respondents, Page Memorial Hospital, J. R. Holsinger, M.D., Fang S. Horng, M.D., James G. Dale, D.O. and Romulo Ancheta, M.D., respectfully request that this Court deny the petition for writ of

certiorari, seeking review of the Fourth Circuit's opinion in this case. That opinion is reported at 945 F.2d 696 (4th Cir. 1991) (*en banc*).

STATEMENT OF THE CASE

The petitioner Dr. Owen Oksanen sued the respondents, Page Memorial Hospital and all of the members of its medical staff, alleging that actions taken by the hospital and its staff during the course of peer review violated the provisions of the Sherman Act, 15 U.S.C. § 1 *et seq.*, and alleging a number of pendent state claims.* The district court

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* The Statement of the Case contained in the petition for certiorari incorrectly states that all of the respondent doctors practiced in Luray, Virginia and were

granted summary judgment in favor of the respondents. On rehearing *en banc*, the United States Court of Appeals for the Fourth Circuit affirmed the judgment of the district court.

Page Memorial Hospital, a non-profit corporation, has an organizational structure which includes three agents as required by state law. Va. Dep't. of Health, Rules and Regulations for the Licensure of Hospitals in Virginia,

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on staff at Page Memorial Hospital at all times relevant to Dr. Oksanen's claims. Dr. Dale did not begin practicing at Page Memorial Hospital until August, 1983, however, and took no part in the proceedings leading to Dr. Oksanen's suspension. Pet. App. 18. The petition also asserts that when Dr. Oksanen first arrived in Luray he was invited to join Dr. Holsinger's practice. This assertion was refuted by Dr. Holsinger by affidavit in the district court.

§§ 102, 103 and 105 (May 1, 1982). The Board of Trustees serves as the governing body. The hospital administrator has responsibility for the day-to-day management of the hospital including responsibility for the hospital staff (nursing, laboratory, pharmacy and other hospital-based services) and for the hospital's relations with the medical staff. The medical staff has responsibility for recommendations regarding medical staffing, peer review, quality assurance and utilization review. Pet. App. 4-5.

Through its by-laws the hospital has delegated authority in the first instance to its medical staff to make recommendations concerning any action to be taken with respect to a

physician's staff privileges. Pet. App. 4-5, 15-16. The Board of Trustees, however, retains final authority over peer review decisions. Pet. App. 4, 15-16.

Complaints concerning Dr. Oksanen's conduct began in 1979 almost immediately after he was granted staff privileges at Page Memorial Hospital and mounted over time despite numerous attempts by the hospital administration to resolve these problems with Dr. Oksanen. Pet. App. 5. The complaints about Dr. Oksanen involved volatile public outbursts, profanity and abusive treatment directed toward hospital employees (including nursing and laboratory personnel), patients and their families, professional

reviewers, the hospital administrator, and members of the medical staff; failure to follow established hospital procedures; failure to provide emergency room coverage; and a refusal to cooperate, and on some occasions even to communicate, with the nursing staff, the hospital administrator and the Board of Trustees when problems arose. Pet. App. 5, 6, 7, 8-9.

As a result of continuing problems between Dr. Oksanen and the nursing staff, in May of 1983 the hospital administrator requested that the medical staff take corrective action against Dr. Oksanen. The medical staff declined to take any disciplinary action against Dr. Oksanen. Pet. App. 6.

In June of 1983, the Board of Trustees sent a letter to all physicians on staff requesting that each do his part in maintaining a harmonious work environment at the hospital. In response, Dr. Oksanen told the Board that he found the letter demeaning and insulting and that he would not cooperate with the hospital unless the Board retracted the letter and dispatched a Board member to personally retrieve it from his office. Pet. App. 6.

The Board of Trustees discussed Dr. Oksanen's response at its July, 1983 meeting and voted unanimously to request that the medical staff take corrective action against Dr. Oksanen. Aware of the medical staff's earlier refusal to discipline

Dr. Oksanen, the Board warned that if action was not taken, it would be forced to evaluate his hospital privileges much more thoroughly during the annual credentialing process. Pet. App. 6-7.

The medical staff responded by voting to revoke Dr. Oksanen's privileges. Dr. Oksanen appealed this decision to a joint conference committee comprised of one member of the medical staff and two members of the Board. This committee heard testimony from sixteen witnesses, including Dr. Oksanen. A number of witnesses testified to the negative impact of Dr. Oksanen's disruptive behavior on hospital staff morale and relations. The committee recommended to the Board that at a minimum Dr.

Oksanen's privileges be suspended. Pet. App. 7. In October of 1983, the Board of Trustees, having heard from Dr. Oksanen and his attorney, suspended his privileges for two months to be followed by a one-year probationary period. Pet. App. 7-8.

Subsequently, further complaints were made concerning Dr. Oksanen's disruptive behavior and his failure to follow established hospital procedures. In May of 1984, the Board of Trustees again requested that the medical staff take correction action against Dr. Oksanen. The staff voted to permanently revoke his privileges. Dr. Oksanen resigned from the medical staff in June of 1984, however,

before the Board made a final decision. Pet. App. 8-9.

REASONS WHY THE PETITION SHOULD BE DENIED

A grant of certiorari is not warranted on the first Question Presented in this case because the Fourth Circuit's decision accords with this Court's ruling in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). Nor does the second Question Presented warrant a grant of certiorari, because its resolution turns upon the particular facts of the case and because the Fourth Circuit correctly applied the summary judgment standard for antitrust litigation articulated by this Court in *Matsushita Electric*

Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

I. THE FOURTH CIRCUIT PROPERLY APPLIED THE *COPPERWELD* INTRA-CORPORATE IMMUNITY DOCTRINE IN DETERMINING THAT THE HOSPITAL AND ITS MEDICAL STAFF LACKED THE CAPACITY TO CONSPIRE DURING THE PEER REVIEW PROCESS.

The first Question Presented in the petition misstates the holding of the Fourth Circuit in this case. The Fourth Circuit did not hold that a hospital and its medical staff as a matter of law can never conspire within the meaning of § 1 of the Sherman Act. Rather, the court held that the hospital and its medical staff lacked the capacity to conspire during the peer review process because the staff was acting as the

agent of the hospital. Pet. App. 11, 19. This Court recently denied certiorari on this same issue in *Nurse Midwifery Associates v. Hendersonville Community Hospital*, 112 S. Ct. 406 (Nov. 4, 1991).

Furthermore, the petition incorrectly states that the Ninth Circuit's decision in *Oltz v. St. Peter's Community Hospital*, 861 F.2d 1440 (9th Cir. 1988), conflicts with that of the Fourth Circuit in the instant case. The Ninth Circuit's holding dealt with a conspiracy between a hospital and a group of doctors outside the peer review process, while the Fourth Circuit's holding specifically deals with the capacity to conspire during peer review when the medical staff is

acting pursuant to a delegation of authority by the hospital.

In *Oltz*, a group of anesthesiologists attempted to coerce the hospital to terminate its contract with a nurse anesthetist and enter into an exclusive contract with them by threatening to leave if the hospital did not accommodate their demands. 861 F.2d at 1443-44. The anesthesiologists acted wholly outside the peer review process. As a matter of fact, the medical staff had recommended that the hospital continue its relationship with the nurse anesthetist. *Id.* In determining that the hospital and the anesthesiologists could conspire, the *Oltz* court stated that the "anesthesiologists were not empowered

to act for St. Peter's" and "[t]herefore...were not acting like an officer in relation to the corporation." *Id.* at 1450.

As the Fourth Circuit emphasized in distinguishing *Oltz*, the "critical element of delegated authority...was absent." Pet. App. 15. In contrast, the medical staff in the instant case was acting pursuant to authority delegated to it by Page Memorial Hospital in making recommendations regarding the status of Dr. Oksanen's staff privileges. The Fourth Circuit likened the hospital's delegation in the first instance of peer review decision-making to its medical staff to a corporation's delegation of authority to its officers. Such delegation of authority falls within

the parameters of the intracorporate immunity doctrine announced by this Court in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984).

The medical staff acts as the agent of the hospital's Board of Trustees to implement a single, unitary firm policy of evaluating the conduct of those to whom the hospital has extended staff privileges. Pet. App. 13. The Fourth Circuit noted that this delegation of authority does not represent a sudden joining together of independent economic forces which might cause concern under the antitrust laws, because the hospital and its medical staff are not competitors. Rather, the medical staff is a natural component of the

hospital's management structure. Pet. App. 13-14. The Fourth Circuit followed this Court's admonition in *Copperweld*, 467 U.S. at 771, that a corporation's delegation of responsibility to an autonomous unit should not be penalized because the effect would be to discourage the creation of divisions with their inherent benefits. Pet. App. 14. *Accord Nurse Midwifery Assocs. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), *cert. denied*, 112 S. Ct. 406 (1991); *Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96 (3d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

The only circuit court to reach a contrary conclusion on this issue, *Bolt v. Halifax Hosp. Med. Ctr.*, 891

F.2d 810, 819 (11th Cir.), *cert. denied*, 110 S. Ct. 1960 (1990), ignored the functional approach to the intracorporate immunity doctrine mandated in *Copperweld*. Pet. App. 12-13. In fact, the *Bolt* court failed to analyze, or to even cite, this Court's decision in *Copperweld* in ruling on the intracorporate immunity issue. Instead, it simply stated that a hospital and the members of its medical staff are legally separate entities. 891 F.2d at 819. In *Copperweld*, this Court, cautioning against exalting form over substance, 467 U.S. at 763, 772, held that a corporation and its separately incorporated subsidiary are entitled to immunity despite the fact that they are legally separate entities.

The Fourth Circuit observed that in the peer review context the hospital and its medical staff were similar to a parent corporation and its subsidiary with respect to unity of interest and the degree of control which may be exercised. Pet. App. 12, 15-16. These same factors influenced this Court in *Copperweld* to find that the coordinated activities of the two entities should be treated as those of a single enterprise. 467 U.S. at 771-72.

The hospital and its medical staff have a unity of interest in protecting the quality of patient care through peer review. Pet. App. 12. Furthermore, the hospital maintained control over the peer review decision-making process.

While the hospital's Board of Trustees sought advice from the medical staff, the Board could modify the staff's recommendations at any time and retained ultimate responsibility for peer review decisions. Pet. App. 15-16. In fact, the Board of Trustees of Page Memorial Hospital, after first requesting that the medical staff take corrective action against Dr. Oksanen, modified the medical staff's recommendation of revocation of privileges to a two-month suspension and one-year probationary period. Pet. App. 7-8. Upon the Board of Trustees subsequent request for corrective action during the probationary period, the medical staff recommended revocation of

privileges. Dr. Oksanen resigned from the medical staff, however, before the Board of Trustees made a final decision. Pet. App. 9.

The assertion in the petition that a hospital "does not require the assistance of the members of its medical staff in order to operate as a going concern," Pet. 21-22, is incorrect. It not only ignores the practical necessities of efficient hospital management, but also ignores the requirements of state licensure law and national hospital accreditation standards. *See* Va. Dep't. of Health, Rules and Regulations for the Licensure of Hospitals in Virginia, §§ 102 and 105 (1982); Joint Commission on Accreditation of Healthcare

Organizations, *Accreditation Manual for Hospitals* 1991 (1990).

Because the Fourth Circuit properly applied the intracorporate immunity doctrine articulated by this Court in *Copperweld* where a hospital delegates the initial peer review decision to its medical staff, review by this Court is not warranted.

II. SUMMARY JUDGMENT WAS APPROPRIATE WHERE THE EVIDENCE, INCLUDING PLAINTIFF'S EVIDENCE, DEMONSTRATED A LEGITIMATE BASIS FOR CORRECTIVE ACTION, INDEPENDENT ACTION BY MEMBERS OF THE MEDICAL STAFF AND NO ADVERSE IMPACT ON COMPETITION.

Dr. Oksanen asserts that he was denied adequate discovery prior to entry of summary judgment against him. Although the complaint in this proceeding was filed against the

respondents on June 13, 1988, Dr. Oksanen did not file the discovery requests about which he complains until October 20, 1988. Responses to these requests were not due when the summary judgment hearing was conducted on November 7, 1988, at which time the district court stayed any further discovery. Dr. Oksanen had been apprised of the date of the hearing since September 8 when the district court established the briefing schedule and set November 7 as the date for oral argument on the motions.

In opposition to the outstanding motions for summary judgment, Dr. Oksanen submitted thirty-five exhibits, including 690 pages of transcripts from joint conference

committee meetings. Pet. App. 24. This evidence established that the hospital administrator and the Board of Trustees of Page Memorial Hospital, not the medical staff, initiated the actions taken against Dr. Oksanen. *Id.* Furthermore, when first requested by the hospital administrator to take corrective action against Dr. Oksanen, the medical staff refused to do so. Pet. App. 6, 24. As the Fourth Circuit noted, this fact belies Dr. Oksanen's theory of a conspiracy among the members of the medical staff. Pet. App. 24.

Dr. Oksanen's boycott claims challenge actions taken by the hospital because of his failure to comply with hospital regulations and

individual choices made by medical staff members. Pet. App. 22-23. The fact that the hospital initiated the peer review proceedings and maintained control over them precluded any inference that individual members of the medical staff had conspired against Dr. Oksanen to deny him privileges. Pet. App. 23. Furthermore, the medical staff lacked the power to implement any such conspiracy. Pet. App. 19, 20.

Numerous attempts were made by the respondents to deal with complaints about Dr. Oksanen prior to taking formal disciplinary action and the procedures utilized during the peer review process were fair. Pet. App. 21. The evidence submitted to

the district court established that Dr. Oksanen was eventually disciplined as a result of a "litany of complaints from various sources" and that the actions taken by the hospital and the doctors on the medical staff were justified. Pet. App. 22. As the Fourth Circuit stated, "additional discovery would not diminish the fact that the complaints lodged against Oksanen provided a legitimate basis for the corrective actions taken against him." Pet. App. 24.

The Fourth Circuit properly held that Dr. Oksanen received adequate discovery on the key issues in this staff privileges suit, Pet. App. 24, and that he simply failed to meet his summary judgment burden of

establishing that "the inference of conspiracy is reasonable in light of the competing inferences of independent action." Pet. App. 25 (quoting *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

Furthermore, summary judgment was appropriate because there was no evidence of any adverse impact on competition. Pet. App. 28. Indeed, the uncontroverted evidence was that seven additional doctors (more than twice the number on staff when the hospital first sought corrective action against Dr. Oksanen) began practicing at Page Memorial Hospital during and shortly after the time period in which Dr. Oksanen was the subject of the disciplinary actions

about which he complains in this proceeding. Pet. App. 27.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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